

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR: 6924

COMPLAINT DATE: 3/10/15

NOTIFICATION DATE: 3/17/15

SUPPLEMENTAL COMPLAINT DATE: 6/9/15

NOTIFICATION DATE: 6/11/15

LAST RESPONSE DATE: 5/18/15

ACTIVATION DATE: 6/12/15

STATUTE OF LIMITATIONS: 10/4/17 – 10/24/17

ELECTION CYCLE: 2012

COMPLAINANTS:

Benjamin J. Cayetano

RESPONDENTS:

Andrew Winer

Pacific Resource Partnership and John White¹ in his
official capacity as treasurer

The Democratic Party of Hawaii

Friends of Mazie Hirono and Carol Puetto in her
official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101

52 U.S.C. § 30116

52 U.S.C. § 30118

52 U.S.C. § 30125

11 C.F.R. § 100.24

11 C.F.R. § 109.21

11 C.F.R. § 109.20

11 C.F.R. § 300.32

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves an allegation that Pacific Resource Partnership and John White in
his capacity as treasurer ("PRP State PAC"), a Hawaii state political committee, coordinated a
2012 independent expenditure campaign with the Democratic Party of Hawaii ("the State Party")

¹ The Complaint names John White individually, but the allegations appear to concern White only in his
official capacity as treasurer. Compl. at 1, 5. The PRP State PAC Response was filed on behalf of PRP State PAC
and White in his official capacity as treasurer. PRP Resp. at 1.

1 and Friends of Mazie Hirono and Carol Puetto in her capacity as treasurer ("Hirono
2 Committee"), the principal campaign committee for U.S. Senate candidate Mazie Hirono, in
3 violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). The allegation
4 is based on the fact that one individual, Andrew Winer, worked as a political consultant for PRP
5 State PAC, the State Party, and the Hirono Committee. The complaint appears to further allege
6 that the State Party violated the Act by paying Winer with nonfederal, as opposed to federal,
7 funds.²

8 As discussed below, the available evidence does not suggest that the communications in
9 question were in-kind contributions in the form of coordinated communications. Further, the
10 record does not appear to support the allegation that the State Party improperly paid Winer with
11 non-federal funds. Accordingly, we recommend that the Commission find no reason to believe
12 that Winer, PRP State PAC, the State Party, and the Hirono Committee violated 52 U.S.C.
13 §§ 30116 or 30118. We also recommend that the Commission dismiss the allegation that the
14 State Party violated 52 U.S.C. § 30125, and close the file.

15 II. FACTS

16 During the 2012 election cycle, political consultant Andrew Winer worked on campaigns
17 for three different political organizations in Hawaii: PRP State PAC, a non-candidate political
18 committee organized under Hawaii state election law;³ the State Party; and the Hirono
19 Committee.⁴ Winer was a paid consultant for PRP State PAC and "performed a variety of
20 services," including helping to "develop its messaging in an independent expenditure campaign"

² The Commission's ongoing audit of the State Party also is examining this issue with regard to the payment of State Party employees.

³ See Compl. at 1.

⁴ Hirono Committee Resp. at 1.

1 in support of Kirk Caldwell in his race for mayor of Honolulu.⁵ The strategy included a series of
2 communications contrasting Caldwell and his opponent, including a door hanger and mailers
3 which urged support for the "Democratic team" and featured images of Caldwell, President
4 Obama, and Hirono (the "PRP Communications").⁶ According to PRP State PAC, the purpose
5 of the PRP Communications, which were distributed in October and November 2012, was to use
6 Obama and Hirono to get frequent voters to support Caldwell in the mayoral election.⁷ PRP
7 State PAC allocated the costs of the PRP Communications among the mentioned candidates and
8 reported the federal portion, which it calculated at approximately \$122,138, as independent
9 expenditures in support of Obama and Hirono on FEC Form 5.⁸

10 In addition to his ongoing work for PRP State PAC, Winer began working for the State
11 Party as a consultant on its "Coordinated Campaign" following the August 2012 primary
12 election.⁹ In this capacity, Winer was charged with "organizing and mobilizing volunteers to
13 canvass specific neighborhoods as well as organize sign-waving events," analyzing and targeting
14 precincts "where efforts were needed to support democratic candidates," and organizing
15 "meetings on get-out-the-vote ('GOTV') strategies to encourage a strong democratic turnout for
16 the general election and to ensure the success of the democratic ticket at the polls."¹⁰ The State
17 Party states that it retained Winer as an independent consultant, not as an employee, and that it

⁵ PRP Resp. at 2.

⁶ *Id.* at 2, Attach. B. Despite this description of Winer's work, PRP also states that Winer "was not paid to create or produce any public communications." *Id.* at 2.

⁷ *Id.* at 6-7.

⁸ FEC Form 5 of PRP, January 31 Year-End Report at 2-5.

⁹ DPH Resp. at 1; *see* Winer Decl. ¶ 2.

¹⁰ DPH Resp. at 1-2; *see* Winer Decl. ¶ 2.

1 allocated Winer's consulting fees according to his work on behalf of both federal and state
2 candidates.¹¹ According to the State Party, Winer's work on the Coordinated Campaign
3 benefited four federal candidates (including Hirono) and approximately 49 state candidates.¹²
4 The State Party states that it was not involved in the non-partisan Honolulu mayoral race or in
5 PRP State PAC's campaign on behalf of Caldwell.¹³

6 In addition to his consulting work for the State Party and PRP State PAC, Winer was also
7 involved in some capacity with the Hirono campaign. The complaint states that Winer was a
8 "senior advisor."¹⁴ The Hirono Committee, PRP State PAC, and Winer all state that Winer was
9 not paid for his services, which focused on helping Hirono prepare for the October 16 debate,¹⁵
10 that Winer's work for the Hirono Committee was unrelated to his work for PRP State PAC, and
11 that Winer did not have actual authority, express or implied, to engage in communications on the
12 Hirono Committee's behalf.¹⁶

13 III. LEGAL ANALYSIS

14 A. Coordinated Communications

15 The complaint alleges that as a result of Winer's position as a vendor of political
16 consulting services to PRP State PAC, the State Party, and the Hirono Committee, the PRP

¹¹ DPH Resp. at 1-2.

¹² *Id.* at 1.

¹³ *Id.* at 2.

¹⁴ Compl. at 1, 4.

¹⁵ The Hirono Committee reported one disbursement to Andrew Winer during the 2012 election cycle: \$1,122.35 for "Reimb – Refreshments for event" on September 19, 2012.

¹⁶ Hirono Committee Resp. at 1-2; PRP Resp. at 3; Winer Decl. ¶¶ 7-9.

1 Communications were coordinated communications.¹⁷ PRP State PAC and the Hirono
2 Committee each deny that there was a coordinated communication because the conduct prong of
3 the Commission's coordinated communication regulation was not met.¹⁸ The State Party
4 generally denies the existence of any coordination between itself and PRP State PAC or the
5 Hirono Committee.¹⁹ Winer filed a response that incorporates in its entirety the PRP State PAC
6 Response.²⁰

7 The Act prohibits corporations from making contributions, including in-kind
8 contributions, to federal candidates and their authorized committees.²¹ Correspondingly, federal
9 candidates and their authorized committees may not knowingly accept a corporate contribution.²²
10 An expenditure made by any person "in cooperation, consultation, or concert, with, or at the
11 request or suggestion of, a candidate, authorized political committee, or a national or state party
12 committee constitutes an in-kind contribution.²³ An expenditure for a communication is
13 coordinated when the communication is (1) paid for, in whole or part, by a person other than the
14 candidate, committee, or party; (2) satisfies at least one of the content standards described in 11

¹⁷ Compl. at 1, 4-5. The complaint also discusses a defamation lawsuit and alleged state-level reporting violations, neither of which is covered by the Act. Compl. at 2-3. The supplemental complaint, filed on June 9, 2015, suggests several potential witnesses that could aid the Commission in an investigation of this matter. It does not add any respondents or allegations. *See* Supp. Compl. at 1.

¹⁸ PRP Resp. at 4-7; Hirono Committee Resp. at 2-5.

¹⁹ DPH Resp. at 2.

²⁰ Winer Resp. at 1.

²¹ 52 U.S.C. § 30118(a).

²² *Id.*

²³ *Id.* § 30116(a)(7)(B)(i), (ii); *see* 11 C.F.R. §§ 109.20, 109.21(b).

1 C.F.R. § 109.21(c); and (3) satisfies at least one of the conduct standards described in 11 C.F.R.
2 § 109.21(d).²⁴

3 The first (payment) prong is satisfied here because PRP State PAC, a third party, paid for
4 the PRP Communications.²⁵ The second (content) prong is also satisfied because the PRP
5 Communications are public communications²⁶ that expressly advocate the election of three
6 individuals, two of whom (Hirono and President Obama) were federal candidates.²⁷

7 The conduct prong is not satisfied, however, because we have no information – beyond
8 the mere fact of an independent contractor relationship with Winer – suggesting that the State
9 Party or the Hirono Committee was involved with the PRP Communications. Although it
10 appears that Winer was materially involved in decisions regarding the creation, production, and
11 distribution of the PRP Communications (such as the content, intended audience, and means of
12 communications),²⁸ it does not appear that Winer was acting as an agent of “a candidate,
13 authorized committee, or political party committee” with respect to the PRP Communications.²⁹

²⁴ *Id.* § 109.21(a)(1)–(3).

²⁵ *Id.* § 109.21(a)(1).

²⁶ “Public communication” includes a “mass mailing,” which means a mailing of more than 500 pieces of substantially identical mail within a 30-day period. *Id.* §§ 100.26, 100.27. PRP reported \$122,138.12 in “postage and printing” for independent expenditures from October 4, 2012, through November 2, 2012. FEC Form 5 of PRP, January 31 Year-End Report at 2-5. Presumably, that amount covered more than 500 pieces of mail.

²⁷ 11 C.F.R. § 109.21(c)(3). PRP states in its response that the PRP Communications “were not intended to influence any federal election” even though they “technically advocated for a vote for the two federal candidates.” PRP Resp. at 6-7. PRP previously reported the PRP Communications to the Commission as independent expenditures, and we agree with its initial determinations. See FEC Form 5, 24/48 Hour Reports of PRP (October 4, 11, 24, 24, and November 12, 2012); January 31 Year-End Report of PRP at 2-5.

²⁸ PRP Resp. at 2.

²⁹ *Id.* § 109.21(d)(2). Likewise, the available information does not show that the PRP Communications were created, produced, or distributed at the “request or suggestion” of the State Party or the Hirono Committee, after one or more “substantial discussions” about the communication between PRP and the Hirono Committee or the State Party (through Winer or otherwise), or that Winer conveyed information about the Hirono Committee’s or the State Party’s plans, projects, activities, or needs that was material to the creation of the PRP Communications, such that

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1 According to the respondents, Winer's work for the Hirono Committee involved primarily
2 debate preparation, not communications, and was unrelated to his work for PRP State PAC.³⁰ In
3 fact, the Hirono Committee and Winer specifically deny that Winer had any authority to engage
4 in communications on the Hirono Committee's behalf.³¹ Further, the State Party states that it
5 was not involved in the non-partisan mayoral race in any capacity, a statement that would appear
6 to preclude involvement in the PRP Communications, through Winer or otherwise.³² In light of
7 the denials, absent some additional evidence of Winer acting on behalf of the State Party or the
8 Hirono Committee with respect to the PRP Communications, or conveying information about
9 their plans, project, activities, or needs, that was material to the PRP Communications, the fact
10 that each of the State Party, the Hirono Committee, and PRP State PAC hired Winer as a
11 consultant does not, alone, support a reason to believe finding in this case.³³

12 Accordingly, we recommend that the Commission find no reason to believe that Winer,
13 PRP State PAC, the State Party, and the Hirono Committee violated 52 U.S.C. §§ 30116 or
14 30118 by making or receiving an in-kind contribution in the form of a coordinated
15 communication.

16 **B. State Party's Payments to Winer**

17 The complaint also appears to allege that the State Party violated the Act because it paid
18 Winer \$17,000 from state funds and \$1,000 from federal funds for work it asserts was focused

either the "common vendor" or "former employee or independent contractor" standards were met. *Id.* §§ 109.21(d)(1), (d)(3), (d)(4)(iii), (d)(5)(ii).

³⁰ Hirono Committee Resp. at 1-2; PRP Resp. at 3; Winer Decl. ¶¶ 7-9.

³¹ Hirono Committee Resp. at 1-2; Winer Decl. ¶¶ 7-9.

³² DPH Resp. at 2.

³³ See MUR 6077 (Norm Coleman) ("close-knit web of relations" between respondents insufficient to support finding of coordination).

1 primarily on the federal Hirono campaign.³⁴ The State Party states that “based on its
2 understanding of Winer’s activity as an independent consultant, the Party’s allocation of the
3 consultant fees to Winer was proper.”³⁵

4 Under the Act, amounts disbursed for federal election activity by a state committee of a
5 political party shall be made from funds subject to the limitations, prohibitions, and reporting
6 requirements of the Act — federal funds or a mixture of federal and Levin funds.³⁶ The Act and
7 Commission’s regulations identify four types of federal election activity: (1) voter registration
8 activity during the period 120 days before a federal election; (2) voter identification, get-out-the-
9 vote activity, or generic campaign activity conducted in connection with an election in which a
10 candidate for federal office appears on the ballot; (3) a public communication that refers to a
11 clearly identified candidate for federal office and that promotes or supports, or attacks or opposes
12 a candidate for that office, regardless of whether the communication expressly advocates; and
13 (4) services provided during any calendar month by an employee of a state, district, or local party
14 committee who spends more than 25% of his or her compensated time during that month on
15 activities in connection with a federal election.³⁷

16 The Complaint questions whether Winer spent more than 25% of his compensated time
17 for the State Party working on activities in connection with a federal election, and thus his
18 consulting fees should have been paid entirely in federal funds. Even assuming an independent
19 contractor like Winer is an “employee” for purposes of section 30125, according to the State

³⁴ *Id.* at 4.

³⁵ DPH Resp. at 2.

³⁶ 52 U.S.C. § 30125(b)(1); 11 C.F.R. § 300.32(a)(2).

³⁷ 52 U.S.C. § 30101(20); 11 C.F.R. § 100.24.

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1 Party, Winer's work on the Coordinated Campaign benefited four federal candidates and 49 state
2 candidates.³⁸ Allocating Winer's work proportionally among federal and state candidates would
3 mean that approximately 7.5% of his wages were in connection with a federal election — well
4 below the 25% threshold, and in relatively close alignment with the allocation of payments to
5 Winer (5.5% from federal funds). Based on the limited information contained in the complaint,
6 there does not appear to be a sufficient basis to conclude that the State Party's payments to
7 Winer were inappropriate. Accordingly, based on the available record, we recommend that the
8 Commission dismiss the allegation that the State Party violated 52 U.S.C. § 30125 by paying
9 Winer with non-federal funds.


³⁸ The State Party did not provide any materials with its response in this matter to support its method of allocating Winer's payments.


IV. RECOMMENDATIONS

1. Find no reason to believe Andrew Winer, Pacific Resource Partnership and John White in his official capacity as treasurer, the Democratic Party of Hawaii, and Friends of Mazie Hirono and Carol Puetto in her official capacity as treasurer violated 52 U.S.C. §§ 30116 or 30118 in connection with the allegations in the Complaint.
2. Dismiss the allegation that the Democratic Party of Hawaii violated 52 U.S.C. § 30125 in connection with its payments to Andrew Winer.
3. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letters.
4. Close the file.

Lisa J. Stevenson
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Kathleen M. Guith
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Mark Shonkwiler
Assistant General Counsel


Peter Reynolds
Attorney

4/18/17
Date